Virgin Records America, Inc v. Thomas Doc. 324

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CAPITOL RECORDS INC.; SONY BMG MUSIC ENTERTAINMENT; ARISTA RECORDS LLC; INTERSCOPE RECORDS; WARNER BROS. RECORDS INC.; and **UMG RECORDINGS INC.**, *Plaintiffs*, v. **JAMMIE THOMAS**, *Defendants*.	Case No. 06-cv-1497 (MJD/RLE) JURY DEMANDED

MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE TRIAL EXHIBIT 4

K.A.D. Camara
Joe Sibley
Camara & Sibley LLP
2339 University Boulevard
Houston, Texas 77005
713 893 7973
713-583-1131 (fax)
camara@camarasibley.com

Garrett Blanchfield #209855
Brant D. Penney #0316878
Reinhardt, Wendorf & Blanchfield
332 Minnesota Street, Suite E-1250
St. Paul, Minnesota 55101
651-287-2100
651-287-2103
g.blanchfield@rwblawfirm.com

Attorneys for Defendant Jammie Thomas

Dated: June 15, 2009

Dockets.Justia.com

MOTION TO EXCLUDE

Pursuant to Fed. R. Civ. P. 26(e)(2) and 37(c)(1) and the Court's trial Orders, Defendant moves this Court for an Order precluding the admission of Trial Exhibit 4, which is not even identified on Plaintiffs Amended Exhibit List, and was not proffered as an exhibit of the Plaintiffs until Friday, June 12, 2009.

STATEMENT OF FACTS

When Plaintiffs sought to introduce their Exhibit 4 in the first trial, this Court properly granted Defendant's Motion in Limine to Preclude the Admission. "During discovery, Plaintiffs produced a collection of 27 Certificates of Copyright of which 14 identified entities other than Plaintiffs as owners." Defendant's Motion in Limine To Preclude the Admission of Plaintiff's Trial Exhibit 4 Pursuant to Rules 26 and 37. The "stack" of documents commonly called Plaintiffs Exhibit 4, was produced by Plaintiffs *after* Defendant alerted the Court to the patent absence of the ownership interests claimed by, and essential to Plaintiffs' claims. Because Plaintiffs nondisclosure of their "stack" was substantially *unjustified*, the Court did not excuse Plaintiffs breaching the Rule 26(e)(2) duty to amend discovery responses. Fed. R. Civ. P. 37(c)(1) prohibited Plaintiffs from offering the "stack" at trial.

Between the first trial and this trial, Plaintiffs never sought leave from the Court's Order excluding these documents from trial. Moreover, Plaintiffs never offered Defendant depositions or discovery on these documents and discovery was only reopened for the limited purpose of Defendant retaining the expert services of Dr. Yongdae Kim. Of course, Plaintiffs had full and fair opportunity to take discovery from Dr. Kim and conducted his deposition prior to trial.

In this new trial, Plaintiffs disclosed their old exhibit list minus Exhibit 4. When counsel for Plaintiffs responded to counsel for Defendant's email with: "Plaintiffs do not have an Exhibit 4 and did not have one at the first trial. We kept the numbers of the other exhibits the same to avoid any confusion." On June 12, 2009—eleven days after the Court's deadline to disclose exhibits—Plaintiffs decided that they would have an Exhibit 4 after all—the "stack" was back three days before trial much to Defendant's prejudice and surprise. If Plaintiffs got their way, not only would Defendant not have the opportunity to conduct discovery on these documents, but Defendant would not have time to prepare for cross examination on these documents at trial as well.

Curiously, Plaintiffs' excuse for this late disclosure was that Plaintiffs did not know until the Monday, June 8, 2009 emergency hearing that this was new trial in the truest sense of the word. According to Plaintiffs, had they known that this was "new" new trial as opposed to an instant replay of the old trial with new jury instructions, they would have disclosed Exhibit 4 earlier. First, Plaintiffs' ignorance of the law and the broad nature of the Court's order is not excuse for untimely disclosure. Second, unlike Defendant in objecting to evidence for the first time, Plaintiffs actually seek the Court to reverse its prior ruling. Such an effort, of course, should have been undertaken months ago, since the basis for the Court's prior order was that Defendant did not have an opportunity to conduct discovery on the documents due to the late disclosure. In short, Defendant is in the same position this time as she was the last trial and there is no good cause or justification for admission of this exhibit.

Plaintiffs lack substantial justification to add Trial Exhibit 4 to the exhibit list only three days before trial. Plaintiffs never sought leave from the Court's prior order to introduce these documents into evidence, did not afford Defendant and opportunity for discovery, and did not even timely disclose their intent to use these documents at trial. See Fed. R. Civ. P. 37(c)(1).

ARGUMENT AND AUTHORITIES

The Court ordered the disclosure of trial exhibits by June 1, 2009. See *Third Amended Date Certain Trial Notice*. Plaintiffs did not disclose Trial Exhibit 4 until June 12, 2009, just three days before trial. Plaintiffs did not motion the court for entry of the late exhibit for good cause. Instead, Plaintiffs unilaterally dumped Exhibit 4 on the Defendant on the eve of trial.

Fed. R. Civ. P. 37(c)(1) states that "if a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). When determining if the exclusion provisions of Rule 37(c)(1) should apply:

> [T]he Court should consider the following four factors in assessing substantiality of any proffered justification for the failure to disclose, as well as the harmlessness of that failure: 1) the importance of the excluded material; 2) the explanation of the party for its failure to comply with the required disclosure; 3) the potential prejudice that would arise from allowing the material to be used at Trial, or on a Motion; and, 4) the availability of a continuance to cure such prejudice.

Knudsen v. Progressive Specialty Ins. Co., Slip Copy, 2005 WL 5979205 *1, (D. Minn. 2005); *see also Citizens Bank v. Ford Motor Co.,* 16 F.3d 965, 966 (8th Cir.1994); *Millen v. Mayo Foundation,* 170 F.R.D. 462, 465 (D. Minn. 1996).

Additionally, Fed. R. Civ. P. 26(e)(1) explains that "a party who has made a disclosure under Rule 26(a) . . . must supplement or correct its disclosure or response" in a timely manner or as ordered by the court." Fed. R. Civ. P. 26(e); *see also Voegeli v. Lewis*, 568 F.2d 89, 96 n. 12 (8th Cir. 1977). When a party fails to amend a prior disclosure under Rule 26(e) on a timely basis, that party may not introduce as evidence at trial supplemental or allegedly corrective information that should have been seasonably provided. Fed. R. Civ. P. 37 (c)(1).

The same exhibit was precluded under similar circumstances the first time this case came before the Court. *See* Memorandum Opinion and Order ("Defendant's Motion in Limine to Preclude the Admission of Plaintiffs' Trial Exhibit 4 [Docket No. 81] is GRANTED."). Because Plaintiffs sat on their hands and never attempted to seek leave to introduce the documents until 3 days before trial, Defendant is now in the same situation as before because there was no opportunity to conduct discovery on these documents –the Court's Order for new trial did not affect the discovery deadlines. Defendant sought leave from the discovery moratorium to retain a new expert. Plaintiffs sat on their hands even up until the deadline to file exhibits, June 1, 2009 and never sought leave to do anything until now.

Given the availability of the evidence, the prejudice to Defendant, and adequate deadline notice to Plaintiffs, Rule 37 clearly prevents the introduction of the information as evidence at trial. Fed. R. Civ. P. 37 (c)(1). *See, e.g. Leathers v. Pfizer*, 233 F.R.D. 687, 697 (N.D. Ga. 2006) ("Plaintiff's nondisclosure is not substantially justified because the conduct of Plaintiff indicates that he understood the October 15 expert deadline to apply to all experts. Defendants correctly point out that 'Plaintiff clearly knew and understood his obligations under the rules . . .').

Therefore, based on Rule 37, the Court's prior Order Excluding Exhibit 4, and the Court's Order requiring trial exhibits be timely disclosed, Plaintiffs should not be permitted to introduce Trial Exhibit 4 at trial.

Respectfully submitted,

/s/ K.A.D. Camara
K.A.D. Camara
Joe Sibley
Camara & Sibley LLP
2339 University Boulevard
Houston, Texas 77005
713 893 7973
713-583-1131 (fax)
camara@camarasibley.com

Garrett Blanchfield
Brant D. Penney
Reinhardt, Wendorf & Blanchfield
332 Minnesota Street, Suite E-1250
St. Paul, Minnesota 55101
651-287-2100
651-287-2103
g.blanchfield@rwblawfirm.com

Attorneys for Defendant Jammie Thomas

Dated: June 15, 2009